Supreme Court, U.S.
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In The

Supreme Court of the United States

RONALD AND MADELINE MOSS, on behalf of their minor child, BOBBY MOSS, and LUCILLE VENTURA, on behalf of her minor child, JOSE VENTURA,

Petitioners,

vs.

CLARA D. CARRIER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not the United States Court of Appeals, Fifth Circuit erred by affirming the United States District Court, Western District's decision to grant summary judgment barring petitioner's suit under the doctrine of res judicata which is in direct conflict with the Court's controlling decision in *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1979).

2. Whether or not the United States Court of Appeals, Fifth Circuit erred by affirming the United States District Court, Western District's decision to grant summary judgment by denying petitioner's right to Due Process under the Fourteenth Amendment of the United States Constitution and in direct conflict with this Court's controlling decision in *Goss v. Lopez,* 419 U.S. 565 (1975).

PARTIES TO THE PROCEEDINGS

PETITIONERS

RONALD AND MADELINE MOSS on behalf of their minor child, **BOBBY MOSS** and **LUCILLE VENTURA** on behalf of her minor child, **JOSE VENTURA**, who are persons of the full age of majority and residents of Iberia Parish, Louisiana.

RESPONDENTS

CLARA D. CARRIER, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies, customs and uses of the Iberia Parish School Board;

ROBBIE J. LEBANC, individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

EDWIN J. BUFORD, individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

JESSE J. "JAY" McDONALD, individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

PARTIES TO THE PROCEEDINGS – Continued

BLAINE A. MECHE, individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

ISABELLA COLLINS, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

MARY B. DAVIS, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

BETTY L. VOORHIES, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

KAY B. MARCEL, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

WOODROW C. "DRO" GONDRON, JR., individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances,

PARTIES TO THE PROCEEDINGS – Continued

regulations, policies customs and uses of the Iberia Parish School Board;

MARY FAY L. FRESHLY, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

RITA M. HOLMES, individually and in her capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

DANNY D. SEGURA, individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

CHARLES G. SANDERS, III., individually and in his capacity as a duly elected official and member of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

EUGENE BAUDRY, individually and in his capacity as an employee of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

JOHN KILGORE, individually and in his capacity as an employee of the Iberia Parish School Board acting

PARTIES TO THE PROCEEDINGS – Continued

under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

JEAN REAUX, individually and in her capacity as an employee of the Iberia Parish School Board acting under color of law and under color of statutes, ordinances, regulations, policies customs and uses of the Iberia Parish School Board;

IBERIA PARISH SCHOOL BOARD, a duly authorized political subdivision of the State of Louisiana, authorized to do and doing business in the State of Louisiana.

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OPINIONS BELOW

On May 3, 2002, Honorable Richard T. Haik, Sr. of the United States District Court, Western District for Opelousas-Lafayette Division rendered written reasons in which he found that there were no genuine issues of material fact and that Jose Ventura's claims were barred by Res Judicata. (Appendix A)

On January 17, 2003, Honorable Circuit Judges Jones, Duhé and Clement of the United States Court of Appeals, Fifth Circuit rendered written reasons affirming the District Court's judgment that there were no genuine issues of material fact and that Jose Ventura's claims were barred by Res Judicata. (Appendix B)

On March 15, 2002, the Supreme Court of Louisiana rendered a decision in the matter of *Lucille Ventura on behalf of her minor child Jose Ventura v. John Kilgore.* (Appendix C)

JURISDICTION

The United States Court of Appeals, Fifth Circuit affirmed the decision of the District Court on January 17, 2003. This petition for a writ of certiorari is filed within the prescribed period of ninety (90) days after the January 17, 2003, final judgment.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. Section 2106.

STATUTORY AND REGULATORY PROVISIONS

U.S. Constitution, Fourteenth Amendment; 28 U.S.C. Section 1331; 28 U.S.C. Section 1291; Louisiana Revised Statute 17:416(3)(a) defines students' due process rights for State of Louisiana; Louisiana Revised Statute 13:4231 defines Res Judicata and its exceptions and Iberia Parish School Board Policy H-3.7 defines the Parish's own due process rights for students attending school within this school district.

STATEMENT OF THE CASE

On or about June 4, 2001, Jose Ventura and Bobby Moss enrolled in summer school with the Iberia Parish School Board and were assigned to attend New Iberia Senior High School. On or about the same date, Jose Ventura and Bobby Moss received a summer school registration packet and attended a mandatory student orientation. At the mandatory student orientation, they were informed about the state and local school board policies regarding attendance, dress and discipline. The registration packet they received informed them and their parents that "all regulations governing the behavior of students and dress code during the regular school session will be in effect."

On Thursday, July 5, 2001, Madeline Moss went to pick up her daughter from summer school and was informed by Mr. John Kilgore that he was conducting an investigation and if it did not concern her daughter, she had nothing to worry about. Mrs. Moss asked why was Bobby being investigated because she had a right to know, but Mr. Killgore told her that she did not because he was

investigating. On Thursday, July 5, 2001, Madeline Moss went home and spoke with her husband about what was told to her by Mr. Kilgore. Mr. Moss called Mr. Kilgore and was asked to come to the school. On or about the same date, Mr. Kilgore allowed the Mosses to view the videotape and was shown a close-up of Bobby Moss. On or about that date, Mr. Kilgore informed the Mosses that someone from the school board would be contacting them for a hearing and that they could go before the board. So the Mosses waited for someone to call them, but nobody did.

On Friday, July 6, 2001, Mr. Kilgore called Jose Ventura to the office and asked him several questions about an incident, but Jose did not respond. Mr. Kilgore contacted Zeb Simon, the football coach, and requested that he come to school. Coach Simon and Mr. Kilgore had a conference and viewed the videotape. Jose Ventura did not review the videotape. On that day, Jose Ventura was removed from summer school because a videotape showed that he entered the boys' restroom seconds after a female student entered the same restroom. Mr. Kilgore told Jose that a teacher found a condom in the boys' restroom, along with various students informing the teacher that two students were having sex in the boys' restroom. Mr. Kilgore accused Jose Ventura of being that student having sex with a female in the restroom. On Friday, July 6, 2001, Mr. Kilgore telephoned the Ventura's residence and spoke with Michelle Clark. Ms. Clark testified that Mr. Kilgore told her to tell Mrs. Ventura that Jose would be late and that Coach Simon was bringing him home and nothing more.

On Monday, July 9, 2001, Lucille Ventura went to the school to inquire from Mr. Kilgore why she was not

notified that her minor child was expelled from summer school. At the meeting, Mr. Kilgore never offered Mrs. Ventura or Jose Ventura the opportunity to see the videotape. On Monday, July 9, 2001, Mr. Kilgore drafted letters to both students' parents indicating that the children had been dropped from summer school and that they would not receive any credit nor were they eligible for reimbursement. These letters were faxed from Mr. Wayne Landry's office on July 12, 2001, at 9:44 a.m., along with a request for a hearing before Judge Charles Porter. On or about July 9, 2001, Jean Reaux assumed principalship for summer school due to a sudden medical leave by John Kilgore. On or about the same date, Mr. Kilgore, allegedly by correspondence informed Ms. Ventura that her child was being dropped from summer school for following a female student to the boys' restroom, remaining with her in the restroom for an extended period of time and helping her exit the restroom without detection. Even though the letter is dated July 9, 2001 and that the principal, John Kilgore, did not sign the letter, Ms. Ventura did not receive the letter until July 27, 2001. On Monday, July 9, 2001, Lucille Ventura filed a Petition for Injunction. On Monday, July 9, 2001, Lucille Ventura obtained an order for her child to attend summer school and he went to school on that day. On Monday, July 9, 2001, Lucille Ventura requested a hearing to review Mr. Kilgore's decision to "drop" Jose Ventura from summer school. On Wednesday, July 11, 2001, attorney for the respondents, Wayne Landry, wrote Judge Porter a letter acknowledging communications with him for an expedited hearing along with attaching the notification letters for both of the students, which were faxed on July 12, 2001. On or about Thursday, July 12, 2001, the respondents filed a Motion and Order to

Vacate the Temporary Restraining Order and Memorandum in Support of the Motion to Vacate. On Friday, July 13, 2001, the court heard the respondents' Motion to Vacate.

On Monday, July 16, 2001, the court issued written reasons for judgment. On or about the same date, the petitioner filed a voluntary motion to dismiss without prejudice and obtain another temporary restraining order. On Monday, July 16, 2001, Lucille Ventura obtained another temporary restraining order to allow her son to attend school. Jose Ventura was allowed to attend school, and he did not miss any days of school. On Tuesday, July 17, 2001, Ronald and Madeline Moss obtained a temporary restraining order to allow their daughter to attend school. Bobby Moss was allowed to attend school. The case entitled *Ronald & Madeline Moss, et. al. v. Jean Reaux, et. al.*, Iberia Parish Docket Number 96218, was continued without date.

On Thursday, July 19, 2001, Mrs. Ventura and Ronald and Madeline Moss wrote a letter to the Superintendent requesting a hearing before the full school board to review the principal's decision to drop the children from summer school. Mrs. Ventura, along with Ronald and Madeline Moss, again on July 24, 2001 wrote a letter to the Superintendent requesting a hearing before the school board to review the principal's decision. Finally, on July 26, 2001, the president of the school board wrote a letter informing the petitioners' attorney that since she was questioning the authority of the summer school principal to eliminate a student form summer school for disciplinary reasons and since the parties instituted court proceedings, her request for hearing was denied. Neither Ms. Ventura nor the Mosses in any of their letters requesting a hearing

questioned the authority of the summer school principal to eliminate a student from summer school. They, being familiar with regular school policies regarding expulsions, simply wanted the school board and/or superintendent to review the principal's decision regarding the expulsions, as provided by the respondents on policies and procedures.

On or about August 6, 2001, Lucille Ventura filed petition for a Writ of Mandamus for the respondents to release Jose Ventura's grade since he did not miss any days from school. The respondents filed a Peremptory Exception of No Cause of Action, Dilatory Exception of Improper Use of Summary Proceedings, and Motion to Vacate alternatively Writ of Mandamus to wit was heard by the court on August 30, 2001. On or about August 20, 2001, petitioner propounded a request for production of documents whereby the respondents were asked to produce summer school administrative expulsion hearings and a copy of the respondents' policy and procedure manual. The request found that the respondents have held two summer expulsion hearings held before the administrative hearing committee. On September 5, 2001, the court sustained the respondents' dilatory exception of improper use of summary proceedings and exception of no cause of action.

On September 4, 2001, a judgment was signed whereby the court provided that even though the students are warned that all (and the same) regulations applicable during the regular school session govern student behavior and dress during summer school, the actions of the school principal did not violate due process and the removal of Jose Ventura was not an arbitrary deprivation of his protected rights; thus, the temporary restraining order of July 9, 2001 was vacated.

On or about September 10, 2001, Lucille Ventura filed a Notice of Intent to Seek Supervisory Writs. On or about December 4, 2001, Lucille Ventura's writ was denied and the Third Circuit held that the trial court did not err in dissolving the TRO, as relator's son was afforded due process in his dismissal from summer school.

On or about January 4, 2002, Lucille Ventura filed a writ with the Louisiana Supreme Court entitled *Lucille Ventura, et. al. v. John Kilgore, et. al.*, Docket Number 2002CC22.

On March 1, 2002, prior to the Louisiana Supreme Court issuing its ruling and prior to the state judgment becoming final, the respondents filed a Motion for Summary Judgment, alternatively, Partial Summary Judgment and Res Judicata. On March 15, 2002, the Louisiana Supreme Court issued its ruling denying petitioners' application for supervisory writs.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. Whether or not the United States Court of Appeals, Fifth Circuit erred by affirming the United States District Court, Western District's decision to grant summary judgment barring petitioner's suit under the doctrine of Res Judicata which is in direct conflict with the Court's controlling decision in *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1979).

Petitioner, Jose Ventura, contends that his claims are not barred by Res Judicata and the respondents' case

should not have been dismissed. The standard of review is whether the District Court abused its discretion and erred in its application of Res Judicata.

Louisiana Revised Statute 13:4231 provides "[e]xcept as otherwise provided by law, a valid and final judgment is conclusive between the same parties, **except on appeal** or other directive review. . . . " Louisiana Revised Statute 13:4232 provides "a judgment does not bar another action by the plaintiff: . . . When the judgment dismissed the first action without prejudice. . . . " In *Energy Development Corporation v. St. Martin,* 01-30266 (5th Cir. 2002), this Court reasoned that "Comment (d) of Louisiana's Res Judicata statute, La. R.S. 13:4231, states that a final judgment is one which disposes of the merits of the case in whole or in part. Therefore, the preclusive effect of a judgment attaches once a final judgment has been signed by the trial court and would bar any action filed thereafter unless the judgment is reversed on appeal." *See Avenue Plaza, L.L.C. v. Falgoust,* 676 So.2d 1077 (La. 1996). In *Avenue Plaza, L.L.C. v. Falgoust,* 676 So.2d 1077 (La. 1996), the Louisiana Supreme Court provided that "A valid and final judgment is conclusive between the same parties, **except on appeal or other direct review**. If a certiorari application is filed, the court of appeal judgment becomes final and definitive when the supreme court denies the application for certiorari. La. C.C. P. art. 2166D."

In *Nilsen v. City of Moss Point, Miss.,* 701 F.2d 556 (5th Cir. 1983), this Court provided that "the test to be applied is settled in our circuit: For a prior judgment to bar an action on the basis of Res Judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction,

there must have been a **final** judgment on the merits, and the same cause of action must be involved in both cases." An important prong of this test established by the Fifth Circuit is not complete. The judgment in this case did not become a final judgment until all the delays for appeal prescribed.

In the case at bar, a judgment in state district court was rendered on September 4, 2001, but it was not final. On or about September 10, 2001, Lucille Ventura filed for Supervisory Writs with the Third Circuit Court of Appeals for the State of Louisiana bearing docket number CW01-01366. On December 4, 2001, that writ was denied. On or about January 4, 2002, Lucille Ventura filed an application for Writ of Certiorari before the Louisiana Supreme Court. (attached exhibit L) In addition, Lucille Ventura also on or about July 16, 2001 filed a Motion for Voluntary Dismissal of this matter without prejudice. On or about September 7, 2001, petitioners filed a Complaint for Damages. The respondents, in accordance with the District Court's Scheduling Order on March 1, 2002, filed the defense of Res Judicata. At the time when the respondents filed their Motion for Summary Judgment, alternatively, Partial Summary Judgment and Res Judicata, the petitioners had previously filed on January 4, 2002 an application for supervisory writ and/or certiorari with the Louisiana Supreme Court. The Louisiana Supreme Court had not rendered a decision in that matter; thus, respondents' defense was **premature**. In accordance with jurisprudence, since a Writ of Certiorari was filed prior to the filing of respondents' Motion for Summary Judgment, subsequently the petitioner, Jose Ventura's claims did not or would not become final until the Louisiana Supreme Court would deny his request for writ application. Once

the Louisiana Supreme Court rendered its decision, petitioners still had ninety days from the date of that judgment to appeal this case to this court. Accordingly, the doctrine of Res Judicata does not apply in the instant case to warrant the dismissal of the due process claims of Jose Ventura.

II. Whether or not the United States Court of Appeals, Fifth Circuit erred by affirming the United States District Court, Western District's decision to grant summary judgment by denying petitioners' right to Due Process under the Fourteenth Amendment of the United States Constitution and in direct conflict with this Court's controlling decision in *Goss v. Lopez*, 419 U.S. 565 (1975).

Petitioners contend that there are genuine issues of material fact and the petitioners were not entitled to a judgment as a matter of law. The standard of review is whether the District Court abused its discretion and erred in its application of Federal Rules of Civil Procedure Article 56.

In *Littlefield v. Forney Independent School District,* 00-10965 (5th Cir. 2001), this Court provided a standard of review for summary judgment. The Fifth Circuit concluded the following:

> This court reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the non movant. *See Smith v. Brenoettsy,* 159 F.3d 909, 911 (5th Cir. 1998); *see also Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 608 (5th Cir. 1998). "Summary judgment is proper if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R.Civ.P. 56(c)). The moving party bears the burden of showing the district court that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. "If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response, and if the pleadings and the designated specific facts show that there is genuine issue for trial." *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). "A dispute over a material fact is genuine if the evidence is such a reasonable jury could return a verdict for the nonmoving party." *Smith*, 158 F.3d at 911 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The substantive law determines which facts are material. *See Anderson*, 477 U.S. at 248.

Louisiana Revised Statute 17:416(3)(a) provides:

A school principal **may suspend** from school or suspend from riding on any school bus a pupil who:

(i) Is guilty of willful disobedience;

(ii) Treats a teacher, principal, superintendent, member or employee of the local school board with intentional disrespect;

(iii) Makes against any one of them an unfounded charge . . .

(b)(1) **Prior** to any suspension, the school principal, or his designee, shall advise the pupil in

question of the particular misconduct of which he is accused as well as the basis for such accusation, and the pupil shall be given an opportunity at that time to explain his version of the facts to the school principal or his designee. In each case of suspension or expulsion the school principal or his designee, **shall** contact by telephone at the telephone number shown on the pupil's registration card or send a certified letter at the address shown on the pupil's registration card to the parent, tutor, or legal guardian the reasons therefor and establishing a date and time for a conference with the principal or his designee as a requirement for readmitting the pupil provided that in the case of **expulsion** the contact with the parent or the guardian **shall** include a certified letter . . .

C. (1) Upon the recommendation by the principal for the expulsion of any student as authorized by Subsection B hereof, a hearing **shall** be conducted by the superintendent or other person designated so to do by the superintendent to determine the facts of the case and make a finding of whether or not the student is guilty of conduct warranting a recommendation of expulsion. Upon the conclusion of the hearing and upon a finding that the student is guilty of the conduct warranting expulsion, the superintendent or his designate, shall determine whether such student shall be expelled from the school system or if other corrective or disciplinary action shall be taken. . . .

(4) The parent or tutor of the pupil, may within five days after the decision is rendered request the city or parish school board to review the findings of the superintendent or his designee at a

> time set by the school board; otherwise the decision on the superintendent shall be final. . . .

According to LA. R.S. 17:416 et. seq. and *Goss v. Lopez*, 419 U.S. 565 (1975), a student must be afforded due process. When a student is removed from school, there should be a notice and hearing following the removal. In *Goss*, the United States Supreme Court held that due process is afforded once an individual is given an opportunity to explain his version of the facts at a discussion with the administrator of the school, the student, and the student's parents. The student first must be told what he is accused of doing and the basis of the accusation. The Court also stated:

> Since misconduct charges if sustained and recorded could seriously damage the student's reputation as well as interfere with later educational and employment opportunities, the state's claimed right to determine unilaterally and without process whether that misconduct has occurred immediately **collides** with the Due Process Clause's prohibition against arbitrary deprivation of liberty. 419 U.S. 565 at 574-575.

The Supreme Court in *Goss* left open the question of what process is due when the suspension is an expulsion. The Court stated:

> We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspensions have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral and written notice of the charges against him and if he denies them

> an explanation of the evidence, the authorities have an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. 95 S.Ct. 729 at 739-740.

The *Goss* court gave us a fundamental understanding of the discipline of children in schools. "When school officials use La. R.S. 17:416 et. seq. to discipline a student, due process must be afforded to that student." *Bonner v. Lincoln Parish School Board,* 685 So.2d 432 (La. App. 2 Cir. 12/11/96). In *Bonner*, the court cited *Goss v. Lopez, infra*, for the proposition that when a student's property interest in education benefits that are temporarily denied him and his liberty interest in reputation are implicated by student's suspension, then qualifications under the Due Process Clause apply. The court further reasoned that La. R.S. 17:416 sets forth the goals and procedures for suspending or expelling a student. The statute affords due process in accord with *Goss*. The facts in *Bonner* showed that the student had several opportunities to explain his version, and that he was provided with written notice explaining the charge and suspension, besides meeting with the principal and then with the superintendent.

In the case at bar, the principal **expelled/ dropped/removed** Jose Ventura and Bobby Moss from summer school (t.tr.page 10 lines 21-30). Ms. Ventura went to the school only to inquire why she had not been informed about her son being removed from summer school (t.tr.page 67 lines 1-12). She was never given the opportunity to view the videotape nor was her son given the opportunity to explain his version of the facts or view the videotape. **On July 12, 2001, Wayne Landry faxed the first/original notification letter dated July 9, 2001,**

stating only that the children had been dropped from summer school and that they would not receive any credit nor would they be eligible for reimbursement. Nowhere in his letter to Judge Porter does he provide for information to the petitioners regarding their due process rights. Ms. Ventura received a certified letter from the school **after** her son was dropped from school, to wit, the letter is dated July 9, 2001 but she did not receive it until July 27, 2001. Ronald and Madeline Moss received a certified letter as well, to wit, the letter was also dated July 9, 2001 but they did not receive it until July 24, 2001. The record is clear that Lucille Ventura sought an injunction on July 9, 2001 and Ronald and Madeline Moss sought an injunction on July 17, 2001. Even prior to or on the date the temporary restraining orders were issued, petitioners requested a hearing on three different occasions.

The superintendent of the Iberia Parish School Board testified that the due process rule of R.S. 17:416 **does not apply to summer school** and that the principal has the complete authority to expel a student from summer school. He further testified that nowhere in the Iberia Parish School Board Policies and Procedures does this principal's authority to expel a student exist.

Trial Transcript page 47: Testimony of Eugene Baudry

> Q. The question is-let me ask you this question. During the school year the school obviously go by 17:416?
>
> A. Yes.
>
> Q. Are you familiar with that Revised Statute?
>
> A. Yes, I am.

Q. And, are you familiar with the due process in that Revised Statute?

A. Yes, I am.

Q. Okay, During summer school, do those same due process procedures apply?

A. No.

. . . .

Q. Okay, But do the school, the policies specifically outline due process for summer school?

A. No.

Trial Transcript page 50: Testimony of Eugene Baudry

Q. I asked, can a principal expel a student from summer school?

A. Yes.

Q. Okay, it that written within the Iberia Parish School Board policies and procedures which is writing that outline that a principal may expel a student from summer school?

A. No.

The summer school registration packet entered into evidence by the court as respondents' exhibit number 2 clearly states that **"all regulations governing the behavior of students and dress code during the regular school session will be in effect."** The trial court in its own reasons for judgment on page 2 of 7 stated that **"[f]urther, students warned that all (and the same) regulations applicable during the regular**

school sessions governed student behavior and dress during the summer school." The respondents' own policy, H-3.7b, petitioners' exhibit 6, provides that "school principals may suspend from school any student for good cause as stated in R.S. 17:416." Since these same policies governing student behavior apply during summer school, Jose Ventura should have been afforded due process in accordance with Louisiana R.S.17:416 and Iberia Parish School Policies and Procedures H-3 thru H-3.7(f).

The respondents contend that the students were suspended, but clearly they were dropped and not allowed to go back to school. Even if this court concludes that they were suspended according to their own policy, H-3.7b, the parent shall be notified in writing of the facts concerning the suspension, including the reasons thereof and **terms thereof**. The letter faxed by Mr. Wayne Landry of July 12, 2001 and drafted by John Kilgore does not meet those standards as provided by the respondents' own policies.

The respondents' contention that the students were dropped from summer school because they could not meet the attendance requirement creates a genuine issue of material fact. This Honorable Court must be mindful that Lucille Ventura obtained an order allowing her child to go to school on July 9, 2001 and again on July 16, 2001; thus, Jose Ventura **did not** miss more than 2½ days of school. Ronald and Madeline Moss, on the other hand, were waiting patiently for their hearing before the school board as told to them by Mr. Kilgore and Mr. Russell. It was only until the respondents did not respond did the Mosses seek to obtain an order for their daughter to go to school.

The dismissals of Jose Ventura and Bobby Moss were in fact expulsions. Even if the respondents and administrators viewed it as a suspension, the procedure for dismissal is, pursuant to the law, unequivocally clear and should have been followed. Our jurisprudence states that 17:416 affords due process when the procedure is followed and in this case the due process procedures were not followed. Ms. Ventura was not notified of the meeting within the time provided, she was not present when the allegations were first made nor did the late correspondence provide a date and time for a meeting with the school officials. Mr. and Mrs. Moss had to contact the principal about their daughter. They were allowed to view the tape, but they were promised a hearing which never occurred. This lack of notice and opportunity to be heard does not comply with the jurisprudence and law of the State of Louisiana. Furthermore, there were no formal charges brought by the principal, as illustrated in La. R.S. 17:416. This lack of formal charges makes the expulsion a circus.

Jose Ventura and Bobby Moss suffered irreparable injuries and damages because they were not afforded due process under the law. Due process requires that there be notice which must be clear and unambiguous. To expel a student from summer school and withhold the grade without being afforded due process is unthinkable and that is exactly what the respondents did; the unthinkable. They violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

On January 11, 2002, Magistrate Judge Methvin rendered a decision in regards to the filing of an amended and supplemental answer alleging the defense of qualified immunity on behalf of the respondents. The Magistrate

Judge ruled that "Because plaintiff alleges that she did not receive proper notice of her son's expulsion or a hearing in connection therewith, plaintiff has adequately alleged that defendants violated her son's rights for the purposes of this *Schultea* review. Thus, the undersigned concludes that plaintiff has sufficiently alleged a constitutional violation and an order limiting discovery is not appropriate."

The petitioners rely on *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed. 396 (1982), whereby the United States Supreme Court provided that qualified immunity is a defense whereby public officials are immune from section 1983 rights claim "if their conduct does not clearly violate established rights of which a reasonable person would have known." In *Schultea v. Wood, et. al.*, 47 F.3d 1427 (5th Cir. 1995), the Fifth Circuit provides that "when a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own require the plaintiff to reply to that defense in detail . . . the district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the defendant's conduct at the time of the alleged acts." The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In *Goss v. Lopez*, 419 U.S. 565, 574 (1975), the United States Supreme Court recognized public education as a property

interest protected by the Due Process Clause that cannot be taken away for misconduct without adhering to the minimum procedures as required by the Fourteenth Amendment.

In the instant case, each member of the school board deposed that they were public officials and their duties were to make and enforce policies and procedures. Each school board member stated in their deposition that there was a procedure in place for student redress – the student could appeal the decision either to the school superintendent or to his designee. Whether that procedure was the same as regular school was an issue. **Each member stated that their duty was to make policy**. Each member was well aware of the policy for student redress and that they believed that the same student redress policy in effect for regular school was applicable during summer school. Accordingly, Iberia Parish School Board Policy H-3.7b adopts Louisiana Revised Statute 17:416 regarding suspensions and expulsion. Mrs. Mary Davis, school board member for District 4, stated in her deposition that there have been expulsion hearings for summer school students during the summer session. The summer school policy G-4.1 provides for attendance during summer school, but fails to address student redress for disciplinary procedures. In fact, Mrs. Collins, a school board member, deposed that the policies and procedures must be strictly followed and that the policy regarding summer school discipline should be revised to specifically address student redress. Each member individual did nothing about the petitioners' request for review hearing before the school board. Numerous school board members deposed that they were policy makers and it was their jobs to enforce the policies of the Iberia Parish School Board. They knew the

procedure and did absolutely nothing to ensure that the petitioners' rights to redress were followed as outlined by their own policies and in accordance with Louisiana Revised Statute 17:416.

Mr. John Kilgore, Mrs. Jean Reaux and Mr. Eugene Baudry were very familiar with the redress or appeal procedures afforded to a student as described above. In fact, Mr. Kilgore, in July of 2000, provided a hearing along with the superintendent and/or his designee for a student who was recommended for expulsion from summer school. The respondents by their inactions and actions did the unthinkable. It is crystal clear from the evidence and the face of the complaint that the respondents violated the Due Process Clause of the Fourteenth Amendment, an established constitutional right and that their conduct was not objectively reasonable, measured by reference to the Due Process Clause; thus, they are not entitled to the defense of qualified immunity.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant a writ of certiorari to the United States Court of Appeals, Fifth Circuit and after due proceedings remand this matter to the United States District Court, Western District, Opelousas-Lafayette Division, to continue the trial on the merits in view of the Honorable Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), materially changing the law applicable to the case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30562
Summary Calendar

RONALD MOSS, on behalf of Bobby Moss; MADELINE MOSS, on behalf of Bobby Moss,

Plaintiffs-Appellants,

versus

CLARA D CARRIER, Individually & in her capacity as a member of the Iberia Parish School Board; ROBBIE J. LEBLANC, Individually & in his capacity as a member of the Iberia Parish School Board; EDWIN J. BUFORD, Individually & in his capacity as Iberia Parish School Board member; BLAINE A. MECHE, Individually & in his capacity as a member of the Iberia Parish School Board; ISABELLA COLLINS, Individually & in her capacity as a member of the Iberia Parish School Board; MARY B. DAVIS, Individually & in her capacity as a member of the Iberia Parish School Board; BETTY L. VOORHIES, Individually & in her capacity as a member of the Iberia Parish School Board; KAY B. MARCEL, Individually & in her capacity as a member of the Iberia Parish School Board; MARY FAY L. FRESHLEY, Individually & in her capacity as a member of the Iberia Parish School Board; RITA M. HOLMES, Individually & in her capacity as a member of the Iberia Parish School Board; DANNY D. SEGURA, Individually & in his capacity as a member of the Iberia Parish School Board; CHARLES G. SANDERS, II, Individually & in his capacity as a member of the Iberia Parish School Board; EUGENE BAUDRY, Individually & in his capacity as Superintendent of the Iberia Parish School Board; JEAN REAUX, Individually & in his capacity as employee for the Iberia Parish School Board;

SCHOOL BOARD OF IBERIA PARISH; JOHN KILGORE, Individually & in his capacity as employee of the Iberia Parish School Board; WOODROW C. GONDRON, JR., Individually & in his capacity as a member of the Iberia Parish School Board, also known as Dro Gondron, Jr.; JESSIE J. MCDONALD, Individually & in his capacity as a member of the Iberia Parish School Board, also known as Jay McDonald,

Defendants-Appellees.

LUCILLE VENTURA, on behalf of Jose Ventura,

Plaintiff-Appellant,

versus

CLARA D CARRIER, Individually & in her capacity as a member of the Iberia Parish School Board; ROBBIE J. LEBLANC, Individually & in his capacity as a member of the Iberia Parish School Board; EDWIN J. BUFORD, Individually & in his capacity as Iberia Parish School Board member; BLAINE A. MECHE, Individually & in his capacity as a member of the Iberia Parish School Board; ISABELLA COLLINS, Individually & in her capacity as a member of the Iberia Parish School Board; MARY B. DAVIS, Individually & in her capacity as a member of the Iberia Parish School Board; BETTY L. VOORHIES, Individually & in her capacity as a member of the Iberia Parish School Board; KAY B. MARCEL, Individually & in her capacity as a member of the Iberia Parish School Board; MARY FAY L. FRESHLEY, Individually & in her capacity as a member of the Iberia Parish School Board; RITA M. HOLMES, Individually & in her capacity as a member of the Iberia Parish School Board; DANNY D. SEGURA, Individually & in his capacity as a member of the Iberia Parish School Board; CHARLES G. SANDERS, II, Individually & in his capacity as a member of the Iberia Parish School Board; EUGENE BAUDRY, Individually & in his capacity as Superintendent of the Iberia Parish

School Board; JEAN REAUX, Individually & in his capacity as employee for the Iberia Parish School Board; SCHOOL BOARD OF IBERIA PARISH; JOHN KILGORE, Individually & in his capacity as employee of the Iberia Parish School Board; WOODROW C. GONDRON, JR., Individually & in his capacity as a member of the Iberia Parish School Board, also known as Dro Gondron, Jr.; JESSIE J. MCDONALD, Individually & in his capacity as a member of the Iberia Parish School Board, also known as Jay McDonald,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC Nos. 01-CV-1806 & 01-CV-1807

(Filed Jan. 17, 2003)

Before JONES, DUHÉ, and CLEMENT, Circuit Judges.

PER CURIAM:[1]

Ronald and Madeline Moss and Lucille Ventura (hereinafter referred to as "Plaintiffs") appeal from the district court's grant of summary judgment for the defendants regarding the plaintiffs' respective and consolidated lawsuits filed under 42 U.S.C. § 1983. The plaintiffs alleged that the defendants violated the Due Process Clause by removing the plaintiffs' respective children from their summer school sessions. This court reviews a grant of summary judgment de novo. *See Green v. Touro Infirmary,* 992 F.2d 537, 538 (5th Cir. 1993).

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[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Ventura brought a previous action based on the same instant facts in Louisiana state courts, which was denied. The instant claims presented by Ventura are therefore barred under the doctrine of res judicata. *See Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 37 F.3d 193, 195 (5th Cir. 1994). Summary judgment was properly granted to the defendants as to Ventura's claims.

Assuming without deciding that the Due Process Clause is applicable to a summer school session, the evidence shows that Bobby Moss received the requisite notice and opportunity to be heard before she was removed from summer school. *See Goss v. Lopez*, 419 U.S. 565, 581-84 (1975). Because there was no due process violation, summary judgment was properly granted for the defendants as to Moss's claims. Accordingly, the district court's judgment is **AFFIRMED**.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

RONALD and MADELINE MOSS, on behalf of minor, BOBBY MOSS	*	CIVIL ACTION NO. 01-1806
VERSUS	*	JUDGE HAIK
CLARA CARRIER, ET AL	*	MAGISTRATE JUDGE HILL

RULING

(Filed May 6, 2002)

Pending before the Court in the above-captioned matter, which has been consolidated with Civil Action No.: 01-1807, *Ventura v. Carrier, et al*, is a Motion for Summary Judgment [#30] filed by Defendants. After reviewing the memoranda and exhibits, the Court finds that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law.

Summer school is a special session of school, contractual in nature. A school system is not required to offer summer school, and students are not required to attend summer school. There is no question that the plaintiffs agreed to abide by the rules or be dropped from the program without receiving a grade or refund. That agreement was signed by the students and their parents. The defendants performed in accordance with that specific summer school agreement; there was no violation of any constitutional or statutory rights.

Furthermore, each defendant was sued individually and in his/her capacity as a member of the Iberia Parish School Board acting under the color of law. There is no allegation that any school board member acted outside of the scope of authority as an elected official. The Iberia Parish School Board was also named as a defendant, but there has been no showing of an unlawful policy or custom that would render it liable to the plaintiff.

Finally, as to the Ventura claim in 01-1807, the Court finds that the claims of Jose Ventura and his parents are barred by res judicata. The due process claims of Jose Ventura were considered by Judge Charles Porter in a hearing to rescind the Temporary Restraining Order issued against the School Board. There, Judge Porter found that the restraining order should be rescinded because there was no violation of Ventura's due process rights. Judge Porter issued a valid, binding judgment to that effect, with reasons, on July 16, 2001.

Thus, the defendants' Motion for Summary Judgment is **GRANTED**, and the case is dismissed with prejudice, each party to bear his own costs.

Thus done and signed this 3rd day of May, 2002.

/s/ Richard T. Haik
RICHARD T. HAIK, SR.
UNITED STATES
DISTRICT JUDGE

APPENDIX C

The Supreme Court of the State of Louisiana

LUCILLE VENTURA ON BEHALF OF HER MINOR CHILD, JOSE VENTURA

VS. NO. 2002-CC-0022

JOHN KILGORE, ET AL.

IN RE: Ventura, Lucille etal; – Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of Iberia, 16th Judicial District Court Div. G, Nos. 96150; to the Court of Appeal, Third Circuit, No. CW 01-01366

March 15, 2002

Not considered. Not timely filed. See Supreme Court Rule X, Section 5.

JLW

PFC

CDK

BJJ

JPV

CDT

JTK

Supreme Court of Louisiana

March 15, 2002

/s/ Rai J. Daigh
Deputy Clerk of Court
For the Court

Supreme Court, U.S.
FILED
MAY 15 2003
OFFICE OF THE CLERK

No. 02-1519

IN THE

Supreme Court of the United States

RONALD AND MADELINE MOSS, on behalf of their minor child, BOBBY MOSS, and LUCILLE VENTURA, on behalf of her minor child, JOSE VENTURA,

Petitioners,

v.

CLARA D. CARRIER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly dismissed the claims brought on behalf of Jose Ventura based upon *res judicata*.

2. Whether the district court correctly dismissed the due process claims brought on behalf of Bobby Moss.

3. Whether the district court correctly dismissed the claims against individual defendants, based on qualified immunity.

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Of The Court Below

On September 7, 2001, nearly-identical Complaints for Damages were filed in United States District Court, Western District by Ronald and Madeline Moss on behalf of their daughter Bobby and Lucille Ventura on behalf of her son Jose. The parents asserted entitlement to recovery of damages for alleged violations of their children's Constitutional rights by members of the Iberia Parish School Board, the system superintendent, the summer school principal and the acting principal. Specifically, the claimants alleged that their children's rights to procedural due process were violated when the defendants dropped the students from summer school. Defendants answered the lawsuits, asserting the defense of qualified immunity. In a 'heightened pleading' review the magistrate determined that an order limiting discovery would not be appropriate. On January 11, 2002, a Motion to Consolidate was filed by Defendants, which motion was opposed by Plaintiffs. The matters were consolidated on January 31, 2002 under the first-filed docket number (Moss).

After a lengthy discovery period, Defendants filed a Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment, seeking dismissal of all claims against all defendants. After considering the memoranda submitted by the parties, Judge Richard Haik granted summary judgment on May 6, 2002, dismissing all claims. Plaintiffs filed a Notice of Appeal on or about May 30, 2002. On January 17, 2003, the U.S. Fifth Circuit Court of Appeals affirmed the district court judgment.

B. Statement Of Facts

During the 2000-2001 school year, Jose Ventura and Bobby Moss were students in the public schools of Iberia Parish. Both enrolled in the summer school program offered by the Iberia Parish School Board for the summer of 2001, each paying tuition in order to repeat a math class which each had failed during the regular school year. A registration packet was provided to each student, and their parents executed documents authorizing their children's attendance and acknowledging their understanding of the policies and requirements of the program. On the first day of the summer school session, both Jose and Bobby attended an Orientation meeting conducted by the summer school principal. The principal stressed the strict attendance policies for the summer school and discussed the fact that all behavioral rules for students during the regular school year would be enforced during the summer school session. Bobby, Jose and their parents understood that if they missed more than two days of summer school, the students would be dropped from the program and could not earn course credit.

On July 5, 2001, two students reported to a teacher that a boy and girl were engaged in sexual conduct in the boys' bathroom. When the teacher investigated, no students were found in the restroom, but a used condom was found in a urinal. The teacher reported his findings to the principal, who interviewed the reporting students. The male student was identified as Jose Ventura; the female student could not be identified by name, but detailed physical descriptions of the girl were provided to the principal. In the course of the investigation, a student positively identified Bobby Moss as the girl he had seen in the boys' bathroom with Ventura.

By the time that Principal Killgore was able to identify Bobby Moss on July 5, the school dismissal time had arrived. Killgore accompanied the girl to her mother's car to inform Mrs. Moss that he was investigating a report of wrongdoing which may involve her daughter. He told the parent that Bobby had denied any involvement, and he indicated that he would call the parent if new information further implicated Bobby. That afternoon, Killgore examined numerous times the campus surveillance videotape of the hallways of the school during the morning session. He confirmed to his satisfaction that Jose Ventura had visited the boys' bathroom with a female student, and he confirmed to his satisfaction the identification of the female as Bobby Moss.

In total, the summer school principal met in person with Moss family members three times on July 5. The parents were informed of the details of the reports about their daughter and the results of Killgore's investigation. They were given an opportunity to review the security videotape, which they watched multiple times. Madeline Moss acknowledged that the girl in the videotape was her daughter Bobby. The parents were told that their daughter would be removed from summer school without receiving a refund of her tuition or credit for her coursework.

On July 6, Principal Killgore attempted to telephone Jose Ventura's mother at home; she was not in. He spoke to Michelle Clark, Mrs. Ventura's cousin, and asked her to have the parent call the school on her return. Killgore also called Jose's football coach, who met in person with Killgore and the student. The coach, student and principal viewed the videotape of the incident. When he was asked questions by the principal inviting him to explain his version of the facts or dispute the charges made by Killgore, Jose testified:

"I just kept my mouth shut." Principal Killgore informed Jose of his findings, and he told Ventura that he would be removed from summer school for going into the boys' bathroom with a female, remaining in the bathroom with her during class time, and assisting the female to exit the bathroom undetected. At Killgore's request, the coach took Jose home from school.

Lucille Ventura returned home before the arrival of her son and his coach on the afternoon of July 6. She heard her son tell Michelle Clark about the incident at school and about his removal from summer school. Mrs. Ventura asked no questions of her son, and she made no effort to contact the coach, the principal, or any other school personnel to inquire about the incident or the removal of her son from summer school. Mrs. Ventura did not meet with Principal Killgore until the following Monday when she appeared at the school in the company of her attorney. The two met at some length with the principal, but they did not view the videotape. Killgore offered to share with the mother and her attorney what evidence he had, but the attorney declined.

On July 9, 2001, Principal Killgore drafted letters to both the Ventura and Moss parents, to inform them in writing that their children had been dropped from summer school and setting out the reasons for the decision. He described the parents' appeal avenue to the superintendent. On the same day, Principal Killgore suffered a heart attack. He did not return to work for the remainder of the summer school session. He was replaced as summer school principal by Jean Reaux, the regular principal at New Iberia Senior High School. Reaux had been at the school at the time of the events described above, and she had been involved in the identification process regarding Bobby Moss.

Before the letters drafted by Killgore could be mailed, on the same day Attorney Lucretia Pecantte-Burton obtained a Temporary Restraining Order from Judge Charles Porter, prohibiting the defendants from preventing Jose Ventura's attendance at summer school. The TRO was served upon Acting Principal Reaux. Because of the issuance of the TRO, school administrators halted the disciplinary process regarding Ventura, and the letter drafted by Principal Killgore was held. At a July 13, 2001 hearing on the school board's Motion to Rescind Temporary Restraining Order, testimony was given by Lucille Ventura, Michelle Clark, Coach Zebulin Simon, Principal Jean Reaux, and Supt. Eugene Baudry. After hearing the testimony and reviewing the evidence, Judge Porter rescinded the Ventura TRO on July 16, issuing detailed Reasons for Judgment including his finding that "Jose Ventura's dismissal from summer school did not violate due process safeguards." On the same date, Attorney Pecantte-Burton obtained a second Temporary Restraining Order on behalf of Jose Ventura from a different judge. On July 17, 2001, the same attorney obtained a Temporary Restraining Order from Judge Carl Williams on behalf of Bobby Moss.

On July 19, while the Ventura and Moss TRO's remained in place, Attorney Pecantte-Burton wrote to the school superintendent, requesting a hearing on the "expulsions" of Ventura and Moss.

On July 20, Judge Carl Williams rendered Judgment on the school board's exception of *res judicata* and no cause of action filed in response to the second request of Ventura for injunctive relief. The judge ordered that the matters at issue were 'moot' since the relief sought could no longer be granted. From that date, the disciplinary process was resumed

by school administrators, and letters originally drafted by Principal Killgore on July 9 were mailed to the plaintiff parents. The summer school session ended July 20, 2001.

On July 23, Principal Reaux sent a letter to the Ventura and Moss parents. She explained that the plaintiff students would not receive credit for the summer school session, per the attendance policy for the session. She also explained that the parents could appeal the decision to the Grievance Committee of the school board. On July 24, Attorney Pecantte-Burton wrote to Supt. Eugene Baudry on behalf of both students, requesting a hearing "before the full school board to review the principal's expulsion of Jose Ventura and Bobby Moss." On July 26, School Board President Clara Carrier wrote to Attorney Pecantte-Burton denying the plaintiffs' request for a hearing before the school board.

On August 6, a Writ of Mandamus was sought on behalf of Jose Ventura, asking the court to compel the issuance of a grade to Jose for the summer school session. Exceptions were filed by the school board and a hearing was held by Judge William D. Hunter on August 30. Judge Hunter ruled that Ventura's attorney had misused the summary proceeding avenue, and he expressed his agreement with the earlier ruling of Judge Porter.

On December 4, 2001, the Louisiana Third Circuit Court of Appeal denied Lucille Ventura's application for supervisory writ from the Judgment of Judge Porter, stating "The trial court did not err in dissolving the TRO as relator's son was afforded due process in his dismissal from summer school." Ventura next sought a supervisory and/or remedial writ from the Louisiana Supreme Court, which application was not considered since it was not timely filed. *Ventura v. Killgore et al.*, 811 So. 2d 894 (La. 2002).

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Correctly Determined That The Due Process Claims Of Jose Ventura Are Barred By *Res Judicata.*

In rejecting the Petitioners' claims below and affirming the opinion of the district court, the Court of Appeals' clear and well-reasoned opinion evidences a correct interpretation of the law and demonstrates why this Petition for Writ of Certiorari should be denied. The opinion does not conflict with the earlier decision in *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983) or more recent controlling decisions on the issue. The U.S. Fifth Circuit has continued to state in *Nilsen* and since that opinion, .hat an action is barred by the doctrine of *res judicata* if: 1) the parties are identical in both actions; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior judgment was final on the merits; and 4) the cases involve the same cause of action. *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979)). "To determine whether the same cause of action is involved, our court utilizes a transactional test." *e.g., Agrilectric Power Partners, Ltd. v. General Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994); *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir. 1987). Under this test, the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts. The rule is that *res judicata* "bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated."

Howe, 913 F.2d at 1144 (quoting *Nilsen*, 701 F.2d at 560) (footnotes omitted). 37 F.3d 193, *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, Louisiana, Inc.*, (C.A.5 (La.) 1994).

In its analysis of Ventura's claims and the controlling jurisprudence, the appellate court cited to *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 37 F.3d 193, 195 (5th Cir. 1994) for its position that Ventura's due process claims are barred under the doctrine of *res judicata*. The *Travelers* case cites to the *Nilsen* case. Clearly, the two are consistent, as was the Fifth Circuit's analysis.

At the heart of Ventura's petition is the claim that the *res judicata* defense was asserted and decided prematurely, before the rendition of a final judgment in the previously filed state court action. Ventura posits that the state court judgment on his due process claims did not become final until the Louisiana Supreme Court declined to consider his writ application on March 15, 2002. This position might be viable if the writ application had been timely made. It was not. Per Louisiana Supreme Court Rule X, Section 5, an application seeking to review a judgment of the court of appeal must be made "within thirty days of the mailing of the notice of the original judgment of the court of appeal." As Petitioner correctly states, notice of the original judgment in the state court case (writ denial by Louisiana Third Circuit Court of Appeal) was mailed on December 4, 2001. Ventura's application to the Louisiana Supreme Court was filed on January 4, 2002. Since December has 31 days, Ventura's application was not filed "within thirty days" of the notice of the original judgment. The representation in Petitioner's application to this court that a writ application was timely made to the state supreme court is incorrect, as evidenced by the Court's ruling attached as Appendix C to Petitioners'

Application. With that failure, the judgment of the Louisiana Third Circuit Court of Appeals became final on January 3, 2002 at the expiration of the time for filing a writ application. The summary judgment motion of Respondents was filed on March 1, 2002. The assertion of the *res judicata* defense in the context of the dispositive motion was not premature. There was clearly a final judgment on the due process issue by the time the motion was filed and considered by the court.

To determine the preclusive effect of a prior Louisiana court judgment, if any, this court must apply Louisiana law. *Amica Mutual Ins. Co. v. Moak*, 55 F.3d 1093, 1096-97 (5th Cir. 1995). In pertinent part, Louisiana's *res judicata* statute provides that

> [e]xcept as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: . . . (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action. La. R.S. 13:4231.

Even Petitioner concedes that the preclusive effect of a judgment attaches once a final judgment has been signed by the trial court and would bar any action filed thereafter unless the judgment is reversed on appeal. Petitioner also asserts that "if a certiorari application is filed, the court of appeal judgment becomes final and definitive when the supreme court denies the application for certiorari." [Petitioners' Application, p. 8] The argument overlooks the specific

language of La. C.C.P. article 2166(E): "If an application for certiorari to the supreme court is *timely filed*, a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari." [Emphasis added]

In the instant case, Ventura did not *timely file* an application for certiorari. Consequently, the Louisiana Supreme Court did not consider the application at all. Thus, the court of appeal judgment became a final/definitive judgment when the deadline for timely filing of the writ application expired. Clearly, the District Court and the Fifth Circuit Court of Appeals correctly found that Jose Ventura's due process claims are barred by *res judicata*. There is no reason to revisit those decisions.

B. The Court Of Appeals Correctly Dismissed The Due Process Claims Of Bobby Moss Based On The Controlling Decision Of *Goss v. Lopez*, 419 U.S. 565 (1975).

Having affirmed the district court's judgment regarding Jose Ventura, the Fifth Circuit next addressed the Due Process claims of Bobby Moss, which had not been previously litigated. The appellate court assumed without deciding that the Due Process Clause is applicable to a summer school session. Even with that assumption, however, the court concluded that the evidence in the record showed that Bobby Moss received the requisite notice and opportunity to be heard before she was removed from summer school. [Appendix A of Petition for Writ of Certiorari] That conclusion was correct and well-supported by the record and the guiding case of *Goss v. Lopez*, 419 U.S. 565, 581-84 (1975).

The record demonstrates that Bobby Moss was reasonably afforded the opportunities outlined in the applicable Louisiana statute at La. R.S. 17:416. Both Bobby and her parents were advised by the principal of the misconduct of which the student was accused; both the student and her parents were afforded the opportunity to view the videotape of Bobby's actions. Bobby had multiple opportunities to explain her version of the facts. Her parents met in person with Principal Killgore on multiple occasions. Due Process in schools does not require that a court of law be convened to hear every suspension. School disciplinary codes cannot be drawn with the same precision as criminal codes, and some degree of discretion must be left to public school officials to determine what forms of misbehavior should be sanctioned. *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973). It is well-established that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Under the time-compressed conditions imposed by the summer school schedule and the practicalities associated with the events at issue, the record demonstrates the adequacy of the due process opportunities afforded to both plaintiffs in the instant case. The actions of the school administrators afforded Bobby Moss and her parents prompt notice of events at issue and every opportunity to be heard. These are the requirements set out in *Goss v. Lopez*. That they were met in the instant case is well-documented in the record.

C. The Individual Defendants Were Correctly Dismissed Based Upon Qualified Immunity.

Since both the district and appellate courts found no Constitutional violation in this case, the qualified immunity asserted by and afforded to the individual defendants was given only short review by the district court and the appellate court. Although Petitioners do not raise the issue as a separate question presented in the writ application, some reference is made to the immunity issue in the pages of the application. Respondents simply comment, in an abundance of caution, that it is well-settled that when a defendant in a § 1983 action claims qualified immunity, the court's first task is to assess whether the plaintiff's allegations are sufficient to establish the violation of a constitutional or statutory right at all, in which case the court must next determine whether, as a legal matter, the right that the defendant's conduct allegedly violates was a clearly established one, about which a reasonable person would have known; if so, then defendant is not entitled to qualified immunity, but if plaintiff's allegations fail to satisfy either inquiry, defendant is entitled to summary judgment based on qualified immunity. 42 U.S.C. § 1983. Applying this analysis to the facts in the summary judgment record justifies the grant of immunity to the individual defendants since the courts concluded that there was no violation of a "clearly established" right of any plaintiff. That conclusion warrants the dismissal of the individual defendants based on immunity.

CONCLUSION

Because the courts below have properly interpreted the law and this Court's precedent, and, because there is no factual basis for Petitioners' claims, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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